No. 17762

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

PAUL JOHN CARBO, et al.,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

SUPPLEMENT TO OPENING BRIEF OF APPELLANT PAUL JOHN CARBO

APPEAL FROM
THE UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF CALIFORNIA

WILLIAM B. BEIRNE
408 South Spring Street
Los Angeles 13, California

A. L. WIRIN
257 South Spring Street
Los Angeles 12, California

Attorneys for Appellant
Paul John Carbo.

No. 17762

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

PAUL JOHN CARBO, et al.,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

SUPPLEMENT TO OPENING BRIEF OF APPELLANT PAUL JOHN CARBO

APPEAL FROM
THE UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF CALIFORNIA

WILLIAM B. BEIRNE
408 South Spring Street
Los Angeles 13, California

A. L. WIRIN
257 South Spring Street
Los Angeles 12, California

Attorneys for Appellant
Paul John Carbo.

TOPICAL INDEX

TABLE OF AUTHORITIES

Cases

Statute

No. 17762

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

PAUL JOHN CARBO, et al.,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

SUPPLEMENT TO OPENING BRIEF OF APPELLANT PAUL JOHN CARBO

SUPPLEMENT TO SPECIFICATIONS OF ERROR

---

14. The trial court erred in instructing the jury that (RT 7635):

> "If I am wrong in what I tell you and it is a serious matter -- if it is just trivia I might get a little reprimand for it from a higher court, but if it is just trivia it is not fatal to your verdict. If I seriously misinstruct you, then any verdict you return would be vitiated. In other words, my word is subject to a review by higher courts; yours is not."

The error of this instruction was pointed out to the court in

appellant's motion for new trial as follows (CT 1046):

"The psychological impact of such an instruction is to lull the jury into a sense of apathy: it really doesn't matter what you do, the appellate court will take care of it. Since it is generally known that only if there is a guilty verdict can there be an appeal, the instruction plainly suggests to the jury that it return a guilty verdict."

15. The trial court erred in instructing the jury that (RT 7654):

" . . . It is necessary further that, in addition to the showing of the unlawful conspiracy or agreement, the Government prove to your satisfaction, beyond a reasonable doubt, that one or more of the overt acts described in the indictment was done by one or more of the defendants or at their direction or with their aid." (emphasis added).

The error of this instruction was pointed out to the court in appellant's motion for new trial as follows (CT 1047):

"This instruction was erroneous, since it is the law that the overt act must have been done or committed -- as alleged in the indictment -- by one of the conspirators, not by some one else."

SUPPLEMENT TO ARGUMENT

XII.

A TRIAL COURT'S ADVISING A JURY THAT ITS VERDICT IS SUBJECT TO REVIEW BY A HIGHER COURT DEPRIVES THE DEFENDANT OF A FAIR JURY TRIAL.

A virtually identical instruction to that quoted above at page 1, under Specification of Error No. 14, was held to be erroneous and prejudicial and the judgment was reversed in United States v. Fiorito, 300 F. 2d 424 (CA 7 1962). There the instruction was (page 426):

> " . . . That's why we have a court of appeals, they will reverse me if I'm wrong. This is not the final judgment, there is a court of appeals to review me and a Supreme Court to review them. That's why we have a great system here."

Said the appellate court of this instruction (page 427):

> " . . . [I]t was inferred that the jury's determination was not to be the final one but would be reviewed by this Court and the United States Supreme Court. Such dilution of the final responsibility of the jury as was thus inferred as permissible to the jury in its determination of the verdict is prejudicial to a defendant. . . . "

In the words of one of the cases relied upon by the court in Fiorito (People v. Johnson, 284 N. Y. 192, 30 N. E. 2d 465, 467), such an instruction "vitiates the trial".

XIII

IN ORDER TO CONSTITUTE THE CRIME OF CONSPIRACY, THE OVERT ACT MUST BE PERFORMED BY ONE OF THE CONSPIRATORS.

The court instructed the jury (RT 7654) that the overt acts need not be performed by any of the alleged co-conspirators but could be performed by a third person "at (the conspirators') direction or with their aid". See page 2, supra, under Specification of Error No. 15.

This was an incorrect instruction as to the law of conspiracy and flies directly in the teeth of the statute. 18 USC 371 (62 Stat. 701), provides that "if two or more persons conspire to commit any offense . . . and one or more of such persons do any act to effect the object of the conspiracy . . . " (emphasis added), the crime is committed. This is plain language and does not permit of the construction that a third person, not an alleged co-conspirator, can commit the overt act. That act must be committed, before there can be the crime of conspiracy, by a co-conspirator (Yates v. United States, 354 U. S. 298, 334).

Of course, it is the law that not all the co-conspirators need commit the overt act (United States v. Rabinowich, 238 U. S. 78, 59 L. Ed. 1211, 1214). So long as there is a conspiracy and

the defendant is a part of it, he is bound by the overt acts committed by any one of the co-conspirators (Bannon v. United States, 156 U.S. 464, 468-9; 39 L.Ed. 494, 496). But, and precisely because of such, what might be termed, vicarious liability, the overt act which will accomplish such binding must be the act of a co-conspirator and not the act of some one else (Yates v. United States, supra; Herman v. United States, 289 F.2d 362, 368 [CA 5 1961], cert. den. 368 U.S. 897).

Not only was the instruction erroneous, 1/ but since the court correctly instructed (RT 7652) that it was necessary "to prove . . . that one or more of the parties engaging in the conspiracy has committed some act to effect the object thereof" (emphasis added), the giving of the erroneous instruction could only create confusion in the minds of the jury: on the one hand (RT 7652), the court instructed that the overt act must be committed by a co-conspirator; on the other (RT 7654), that it could be committed also by some one else.

1/ A like error was committed when the court instructed (RT 7789) that the Daly-Leonard conversation (overt act u. in Count I [CT 5]) could be considered by the jury if "Daly was either a coconspirator . . . or . . . an agent, that is that he was one who was acting for one of the conspirators" (emphasis added). This is discussed at pages 55-56 of the Opening Brief of Appellant Gibson.

CONCLUSION

The judgments should be reversed.

Respectfully submitted,

WILLIAM B. BEIRNE

A. L. WIRIN

Attorneys for Appellant
Paul John Carbo